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Supreme Court of the United States

OCTOBER TERM, 1946

No. 1329

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
(Respondent-Impleaded-Appellee),

against

GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased,
Respondent,
(Libellant-Appellee),

and

H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM,"
Respondent,
(Respondent-Appellant).

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors of Petitioner.

PAUL SPEER,
Counsel for Petitioner.

Bowne & Co., Inc., 163 Front Street, New York 7

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Supreme Court of the United States

OCTOBER TERM, 1946.

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY, *Petitioner, (Respondent-Impleaded-Appellee),* against GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased, *Respondent, (Libellant-Appellee),* and H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM," *Respondent, (Respondent-Appellant).*	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Hon. the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Todd Shipyard Corporation, Successor by merger to Robins Dry Dock & Repair Company, respectfully shows to this Court as follows:

This is a petition for a Writ of Certiorari to review a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit, which decision modified the decree of The United States District Court for the Eastern District of New York holding H. E. Moss & Company solely liable for the death of Peter Puleo, deceased, so as

to hold the petitioner herein primarily liable and H. E. Moss & Company secondarily liable.

The fundamental question presented in this petition is whether the courts should interpret a vessel repair contractor's indemnity agreement as a promise by the contractor to save harmless the owner of the vessel for its own active negligence in the absence of explicit language to that effect.

The petition is prayed for because the decision of the United States Circuit Court of Appeals for the Second Circuit herein is in direct conflict with the decisions upon the same point in other Circuits and the applicable decisions of the Court of Appeals of the State of New York, a local court of last resort, concerning the same important question of local law.

Todd Shipyard Corporation, the petitioner, by contract with the United States Maritime Commission, agreed to make certain repairs to vessels, including the Tanker *Lucellum,* owned by H. E. Moss & Company, and as a part of said contract, agreed to place proper safeguards for the prevention of accidents, to use its best efforts to prevent accidents or injury to the persons or property of another, and to indemnify and save harmless the vessel and the owner of the vessel from all suits or action, and damages or cost of every name and description to which the vessel, or the owner thereof, might be subjected or put by reason of injury to the person or property of another arising or growing out of performance of the contract by the contractor, its servants, agents, or sub-contractors.

Pursuant to the terms of said contract, and while employed by petitioner and engaged in repairing the vessel *Lucellum,* Peter Puleo sustained injuries which were the competent producing cause of his death.

Grace Puleo, as administratrix of the Estate of Peter Puleo, deceased, thereafter instituted action against H. E.

Moss & Company to recover for the wrongful death of the deceased. H. E. Moss & Company thereafter impleaded the petitioner, alleging that the fault was the petitioner's, and in addition thereto pleaded its right to indemnity under the terms of the repair contract.

The Trial Court held that the death of Peter Puleo was due solely to the negligence of H. E. Moss & Company and decreed that the libellant, Grace Puleo, as administratrix, recover of and from H. E. Moss & Company the sum of Thirty-five Thousand fifty-nine and 76/100 ($35,059.76) Dollars, with interest from March 21st, 1946. The Trial Court dismissed the libel and petition against petitioner and adjudged that it recover the sum of Fifty-four and 56/100 ($54.56) Dollars, as costs, together with interest from March 21, 1946.

Upon the appeal of H. E. Moss & Company to the United States Circuit Court of Appeals for the Second Circuit the said Court rendered a decision holding H. E. Moss & Company at fault, and did not hold this petitioner at fault. The Court held however that petitioner was liable to indemnify H. E. Moss & Company, according to the terms of the above described indemnity agreement.

TODD SHIPYARD CORPORATION

By Paul Speer

Counsel

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

Paul Speer

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1946.

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY, *Petitioner, (Respondent-Impleaded-Appellee)*, against GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased, *Respondent, (Libellant-Appellee)*, and H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM," *Respondent, (Respondent-Appellant)*.	No. .....

BRIEF IN SUPPORT OF PETITION

The Facts.

Todd Shipyard Corporation, the petitioner, pursuant to contract with the United States Maritime Commission (Moss Exhibit 6, fols. 112-168), made certain repairs to the S/S *Lucellum*, a tanker type ship, owned by the respondent, H. E. Moss & Company.

The said contract, among other things, provided that the petitioner shall indemnify and save harmless the vessel and the owner of the vessel from all suits or action, and damages or cost of every name and description to which the vessel or the owner thereof may be subjected or put by reason of injury to the person or property of another, arising or growing out of the performance of the contract

by the contractor, its servants, agents, or sub-contractors (Article XIV, fols. 144, 145).

Peter Puleo, deceased, an employee of petitioner, while engaged in the performance of said contract, sustained certain injuries which concededly were the competent and producing cause of his death (fol. 230). The said injuries were the result of a gasoline explosion which occurred when the deceased lighted a burning torch for the purposes of freeing a frozen valve on No. 7 tank of said vessel.

The Number 7 tank at the time of the accident was not only an unsafe place in which Puleo was to work with a burner, but was unsafe because of the previous careless performance of a duty resting upon the ship to use reasonable care to properly and efficiently flush away gasoline and its vapors from pipes and valves where work was to be done thereon, such as Puleo was directed to do, with the knowledge of the ship's officers, who were then reasonably aware of the work about to be done and its danger (Findings of Fact No. 6, fol. 742).

A libel was filed by Grace Puleo, as administratrix of the Estate of Peter Puleo, deceased, against respondent, H. E. Moss & Company, who subsequently impleaded petitioner.

The action came on for a hearing before District Court Judge INCH, who held as a fact that H. E. Moss & Company had furnished Peter Puleo, deceased, an unsafe place to work (Findings of Fact No. 6, fol. 742), and concluded that respondent, H. E. Moss & Company, was liable for damages suffered by the Estate of Peter Puleo by reason of his wrongful death, and that petitioner was guilty of no negligence (Conclusions of Law 4 and 6, fols. 752, 753).

An appeal was taken to the Circuit Court of Appeals by the respondent, H. E. Moss & Company, and the Court by its opinion held that petitioner was primarily liable, and the respondent, H. E. Moss & Company, was second-

arily liable, upon the ground "that the Todd Shipyard Company, as successor of the Robins Company, must indemnify the Moss Company under the contract" (Opinion, page 277). The Court did not find negligence upon the part of petitioner.

POINT I.

The decision of the Circuit Court of Appeals is in conflict with the decisions of the highest court of the State of New York.

The indemnity agreement (Contract, Article XIV, fols. 144, 145), by its terms, was limited to suits, actions, damages and costs of every name and description to which "the vessel or owner thereof may be subjected or put by reason of injury to the person or property of another *arising or growing out of performance of the contract by the contractor, its servants, agents or sub-contractors*" (Italics ours).

The Court of Appeals of the State of New York decided that a sub-contractor was not liable to indemnify a contractor for amounts paid in satisfaction of judgments awarded employees of the sub-contractor as the result of injuries sustained by them through the negligence of the contractor.

The sub-contractor's agreement was to indemnify the contractor "against all claims for damages to persons growing out of the execution of the work, and to maintain compensation insurance covering employees as required by law, and liability insurance against all claims for damages for personal injuries or death suffered by persons other than employees and growing out of the execution of the work."

"Work" was defined in the contract as "the work, materials, matters and things required to be done and furnished by sub-contractor under this contract."

In *Thompson-Starrett Company, Inc.* v. *Otis Elevator Company,* 271 N. Y. 36, 41, 43, Mr. Justice HUBBS, speaking for the Court, stated:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms. (*Employers' Liability Assur. Corp.* v. *New York Linen Supply & Laundry Co.,* 239 N. Y. 560; *Manhattan Ry. Co.* v. *Cornell,* 54 Hun, 292; aff'd., 130 N. Y. 6347.)
>
> "That such is the rule in this State has been recognized alike by the Federal courts as well as courts of other states, the decision in *Manhattan Ry. Co.* v. *Cornell* (*supra*), being cited in support thereof. (Cf. *Wallace* v. *United States,* 16 Fed. Rep. (2d) 20; *Perry* v. *Payne,* 217 Penn. St. 252.)"

and further stated:

> "The mere fact that the accident occurred while the employees of appellant were engaged in work as defined in the contract is not sufficient to impose liability under the indemnity agreement. While it is true that the accident would not have occurred had they not been so engaged, the work was not the cause of the accident. It was respondent's own negligence which was the cause, and under such circumstances the language of the indemnity agreement was far too general in its nature to impose liability upon the appellant."

Subsequent to the above decision a similar question was again raised in said Court in the action of *Employers' Liability Assurance Corp. Ltd. of London, England, respondent,* v. *Post & McCord, Inc., appellant,* 286 N. Y. 254, and the Court affirmed the *Thompson-Starrett Co.* v. *Otis Elevator Co.* opinion discussed above.

Under the rule laid down by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the Circuit Court of Appeals should have followed the law as declared by the decisions of the highest court of the State of New York.

POINT II.

The decision of the Circuit Court of Appeals is in conflict with the decisions in other circuits.

It appears to be a general rule that contracts of indemnity will be strictly construed and should be when it is claimed that they relieve the indemnitee of liability for his own negligence, and they will not be so construed unless such agreement is expressed in clear and unequivocal terms.

In *United States* v. *Wallace, et al.*, 18 Fed. (2d) 20 (C. C. A. 9) the Circuit Court of Appeals for the Ninth Circuit in deciding an action instituted by an injured employee of a contractor, for damages in compensation of injuries sustained through the negligence of the ship owner, held that a provision as follows, "the contractor is to fully protect the ship and owners against any and all claims for injury to workmen engaged by him or his sub-contractor, in carrying out work on the vessel," read literally, would undoubtedly be broad enough to cover a case where the indemnitee is alone chargeable, but stated that it would not so interpret the provision, quoting as authority for its interpretation of the provision, 5 Elliott on Contracts, Section 407, to the effect "a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee himself, unless such an intention clearly appears," and laid down the following rule:

> "The established principle is thought to be that general words alone do not necessarily import an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter; it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in clear and unequivocal terms. *Perry* v. *Payne*, 217 Pa. 252, 66 A. 553, 11 L. R. A. 1173, 10

Ann. Cas. 589; *Mitchell* v. *Southern Ry. Co.*, 124 Ky. 146, 74 S. W. 216; *Manhattan Ry. Co.* v. *Cornell*, 54 Hun, 292, 7 N. Y. S. 557, Id., 130 N. Y. 637, 29 N. E. 151; *Houston & T. C. R.* v. *Diamond Press Brick Co.* (Tex. Civ. App.) 188 S. W. 32; *Marshall* v. *Maryland R. R. Co.*, 1 W. W. Har. (Del.) 170, 112 A. 526; *Mynard* v. *Syracuse*, 71 N. Y. 180, 27 Am. Rep. 28; *Dingledy Co.* v. *Erie R. Co.*, 102 Ohio St. 236, 131 N. E. 723."

Other circuits have discussed the same general principles and laid down the same general rules. See:

Doughnut Mach. Corporation v. *Bibbey*, 65 Fed. (2d) 634, 637 (C. C. A. 1);

Sinclair Prairie Oil Co. v. *Thornley, et al.*, 127 Fed. (2d) 128, 133 (C. C. A. 4);

Southern Bell Telephone & Telegraph Co. v. *Mayor and Board of Aldermen of City of Meridian, Miss.*, 74 Fed. (2d) 983, 985 (C. C. A. 5);

Buckeye Cotton Oil Co. v. *Louisville & N. R. Co.*, 24 Fed. (2d) 347, 348 (C. C. A. 6);

North American Ry. Const. Co. v. *Cincinnati Traction Co.*, 172 Fed. 214, 216 (C. C. A. 7).

LASTLY.

It is respectfully submitted that a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Petitioner.

PAUL SPEER,
Counsel for Petitioner.

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Petitioner,
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against

GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased,

Respondent,
(Libellant-Appellee),

and

H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM,"

Respondent,
(Respondent-Appellant).

REPLY BRIEF OF PETITIONER, TODD SHIPYARD CORPORATION

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Petitioner.

PAUL SPEER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946

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REPLY BRIEF OF PETITIONER, TODD SHIPYARD CORPORATION

The respondent, H. E. Moss & Company, in its brief in opposition, contends that the rule laid down in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, does not apply herein.

In so contending respondent, H. E. Moss & Company, overlooks the fact that the basis for the court's jurisdiction of the suit herein is the law of New York, as no right exists under general maritime law to bring a death action.

Just v. *Chambers,* 312 U. S. 383, 388.

The respondent, H. E. Moss & Company, further overlooks the fact that the jurisdiction of the indemnity provision of the contract was retained by the court, sitting in admiralty, for the purpose of avoiding multiplicity of litigation.

> *American Stevedores, Inc.* v. *Rosario Porello and United States of America,* October Term, 1946, No. 69, decided March 10, 1947.

The indemnity provision itself does not raise a constitutional question, involve a federal statute, a federal right, nor an admiralty question. Were it not for the fact that the court retained jurisdiction for the purpose of avoiding multiplicity of action, a different result could have been obtained in the highest courts of the State of New York, had petitioner the right to sever the non-maritime question.

Respondent, H. E. Moss & Company, concedes that the law of the forum, that is, the substantive law of New York, holds

> "that the parties do not intend to indemnify against the consequences of an indemnitee's negligence, unless the intention so to do is 'unequivocally expressed'—i. e., in haec verba" (Brief of Respondent, H. E. Moss & Company, in opposition to Petition, page 3).

In the interests of uniformity and justice, the mere fact that the federal court retained jurisdiction of the question should not prejudice the substantial rights of petitioner, Todd Shipyard Corporation.

The cases cited by respondent, H. E. Moss & Company, in its brief in opposition to the petition, as to whether or not the decision of the Circuit Court of Appeals is in conflict with the decisions in other circuits, do not in any manner change the general law upon the subject; nor do they resolve the conflict in the different circuits.

The brief of Grace Puleo, as Administratrix, does not dispute the substantive law of the State of New York, nor does it dispute the fact that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions in other circuits.

LASTLY.

The petition for certiorari should be granted.

Respectfully submitted,

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Petitioner.

PAUL SPEER,
Counsel for Petitioner.

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—against—

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Respondent,
(*Libellant-Appellee*),

and

H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM",

Respondent,
(*Respondent-Appellant*).

ADDENDUM TO REPLY BRIEF OF PETITIONER, TODD SHIPYARD CORPORATION

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Petitioner.

PAUL SPEER,
Counsel for Petitioner.

Supreme Court of the United States

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H. E. MOSS & COMPANY, owner of S. S. "LUCELLUM",

Respondent,
(Respondent-Appellant).

ADDENDUM TO REPLY BRIEF OF PETITIONER, TODD SHIPYARD CORPORATION

The petitioner, Todd Shipyard Corporation, after serving and forwarding for filing herein its Reply Brief on June 4, 1947, had brought to its attention, upon the same evening, the attached opinion which, so far as it can learn, has not yet been officially reported.

The opinion by The United States Circuit Court of Appeals for the Second Circuit, Judge Learned Hand speaking for the Court, holds that in a statutory action, under the Federal Employers' Liability Act, the law of New York concerning indemnity agreements was authoritative and binding upon said court.

Petitioner submits that this conflicting opinion is an additional reason why the Writ of Certiorari should be granted herein.

Respectfully submitted,

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Petitioner.

PAUL SPEER,
Counsel for Petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 209—October Term, 1946.

(Argued April 15, 1947 Decided May 9, 1947.)

Docket No. 20512

EDWARD MOSTYN,

Appellee,

—v.—

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, and S. H. GOLDEN COMPANY, INC.,

Appellants.

Before:

L. HAND, SWAN and CLARK,

Circuit Judges.

On appeal from a judgment of the District Court for the Northern District of New York, in an action brought under the Federal Employer's Liability Act,* to recover for injuries from being run over by a railway train.

TRACY H. FERGUSON, *for S. H. Golden Co. Inc.*

GUSTAV P. BLAUSTEIN, *for the D. L. & W. R. R.*

OSCAR J. BROWN, *for the appellee.*

* §51, Title 45, U. S. Code.

L. HAND, *Circuit Judge*:

The defendants appeal from a judgment entered on a verdict for the plaintiff in an action brought under the Federal Employer's Liability Act,* for personal injuries from being run over by a train of the railroad company. Mostyn sued the railroad, which impleaded the Golden Company under a contract of indemnity, alleging that that company was primarily liable. On this appeal the railroad argues that Mostyn was not in its employ at the time; that if he was, in any event he was not acting within the scope of his employment; and that he failed to show that the railroad was negligent in the management of the locomotive which ran over him. The Golden Company on its own behalf raises the same objections as the railroad to Mostyn's recovery, and in addition alleges that, if the railroad was liable, its contract of indemnity did not cover the liability. The evidence was in outline as follows. Mostyn was one of a gang of casual track-workers employed by the railroad in track repairs in the neighborhood of Sherburne, New York, near Syracuse. While in the railroad's employ the Golden Company housed and fed the men at Sherburne in "bunk cars" (disused railway cars fitted up with bunks for their accommodation and standing upon an unused track). The track on which the "bunk cars" stood ran north and south, and to the west of it was another track, not ordinarily used, which the workmen had to cross to enter or to leave the "bunk cars." Mostyn had worked for the railroad at Sherburne for eight or nine days in June, 1944. He then left and went to work for another road at Buffalo, but came back to Sherburne some time in July. The 10th of August was a Thursday, and he finished work at

* §51, Title 45, U. S. Code.

about 3:30, receiving a pay-cheque for a fortnight's wages. He had been sleeping and eating in the "bunk cars," and presumably he slept in them or close outside on Thursday night. On Friday morning he did no work; but after washing his clothes, he went in town on errands of his own and did not come back until evening. He took his supper in a "bunk car," but as he had found the bunk in which he slept so verminous that it was impossible to sleep and as the night was hot, he took his blankets and lay down to sleep parallel with the west rail of the track we have just mentioned, about three or four feet away. At about one o'clock on Saturday morning it became necessary to pull out some refrigerator cars that lay on this track just north of the "bunk cars," and to do so a locomotive with its tender backed north along it to couple with them. At the time when it had reached the spot where Mostyn lay, there were two men upon the locomotive proper and two upon the rear of the tender. One of the last was standing upon a "stirrup" on the west side of the tender carrying a lantern; the other was above him on a ladder which ran to the top of the tender. An electric bulb of 150 watts at the rear of the tender illuminated the track for about 800 feet ahead except the first thirty feet just in front of the tender. The engineer was looking backward down the track on the west side of the locomotive which was moving at about two miles an hour without ringing any bell. In some unexplained way Mostyn's right foot was cut off by the wheels of the tender or the locomotive; a possible explanation is that he woke up as the tender was passing, turned on his left side and put his right leg over the rail. There was some confirmation for this explanation in the testimony of some witnesses that no blood was found on the first seven wheels of the tender and locomotive. The judge left it to the jury to say whether he was employed in interstate

commerce at the time, whether the operation of the locomotive was negligent, and how far he was guilty of contributory negligence. As to the Golden Company he left it to them to say whether its failure to keep the bunks in the "bunk cars" free from vermin was a contributing cause to the injury. Upon this appeal neither defendant presses any exception taken to the charge, or any question of evidence.

The question whether Mostyn was "employed" within the meaning of the statute* divides itself into two parts: whether he had ended his engagement on Thursday night or on Friday morning, and had not resumed it before he was hurt; and, if he had not, whether he was "employed" at all while he was asleep beside the track. The defendants argue that when he did no work on Friday and went to the village, he quit the job as he had in June, and that his return to the "bunk cars" on Friday night was not a reentry upon it. No doubt it was possible for the jury so to construe his conduct on Friday, but it was not necessary that they should, for the uncontradicted testimony of a fellow employee, Wood, was that when an employee meant to quit he went to Syracuse to get his last pay. It was possible to construe the arrangement to be that these casual workers were free to work or to take a day off at their pleasure, but that they were not to be understood to have quit the job merely because they did the second. If so, although Mostyn was not "employed" on Friday while he was in town, when he came back that night to sleep he was as much and as little "employed," as he would have been had he been working during the day.

A more difficult question is as to when a man, continuously employed in interstate commerce, shall be deemed to be

* §51, Title 45, U. S. Code.

within the statute, though at the time when he is hurt he is not at work. It was possible, and perhaps more reasonable, to read the section simply to mean that so long as he was employed by an interstate railroad, he was protected wherever he may be. That would mean that if the railroad negligently injured him at home—a most unlikely possibility to be sure—he might invoke the statute. The difficulty arose, however, from the fact that before the amendment of 1939, the courts had ruled that he must be directly engaged in interstate commerce at the time he was hurt: this was the device by which the supposed chasm of unconstitutionality was bridged. Even so, it was necessary to define when a man became directly engaged in interstate commerce, though all his work was interstate while he was engaged in it. Was he so employed while he was going to his work and coming away? It was held that he was,* but distinctions at once began to proliferate as to that, for he might stop on his way, or choose a route dictated for his own purposes.** Or again he might interrupt the continuity of his work for a purpose not directly connected with it.† It would be too optimistic to say that the decisions can all be reconciled. We hold, as we did in *Young* v. *New York, N. H. & H. R. R., supra,* that any activity undertaken by an employee for a private purpose is certainly not within his employment. That, however, does not answer the difficulties, for the really important question is of activities which, though literally not part

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* *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170.

** *Young* v. *New York, N. H. & H. R. R.,* 74 Fed. (2) 251; 79 Fed. (2) 844 (C. C. A. 2); *Virginian Railway Co.* v. *Early,* 130 Fed. (2) 548 (C. C. A. 4); *Sassaman* v. *Pennsylvania R. R. Co.,* 144 Fed. (2) 950 (C. C. A. 3).

† *North Carolina Ry. Co.* v. *Zachary,* 232 U. S. 248; *Chicago M. & St. P. R.* v. *Kane,* 33 Fed. (2) 866 (C. C. A. 9).

of the work, are necessary to its performance. Going to and coming from the job certainly are part of the work. What of eating and sleeping? These are certainly essential to its performance; yet, if they are included, are we to say that an employee is "employed" who is injured while at home, as we suggested a moment ago?

Amid such casuistical dilemmas it is best not to attempt comprehensive solutions, but to proceed step by step. It seems to us that when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its "employ." Unless that is true we are driven back to including only the very work itself with the addition of going to or away from it. While the amendment does not help textually towards a solution, it does impressively disclose an overall purpose to extend the scope of the statute. We think that to implement this purpose we must go at least as far as the facts here before us; and we hold that, had Mostyn been sleeping in one of the "bunk cars," he would have been in the "employ" of the railroad. If so, the fact that he was driven out because the cars were unfit for sleeping, made it reasonably foreseeable that he would seek a substitute; and a jury might find a nearby bed on the earth such a substitute on a hot August night.

There was evidence to support a verdict against the railroad for negligence. It was proved that the men in the "bunk cars" constantly crossed the track, and had to do so, for, as we have said, their only exit was on that side. The infrequency of the track's use was an assurance of safety, and an added ground for caution on those occasions when it was used. It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay

asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed.* However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and hence the duty was not limited to those who were crossing the track. The jury was free to find—indeed could scarcely have avoided finding—that even the most casual lookout would have discovered Mostyn lying where he was; and his contributory negligence in doing so was of course not a defence.**

There remains only the question whether the contract between the railroad and the Golden Company covered a liability resulting from the fault of both. As we have said, the jury found that the verminous "bunk car" was a contributing cause to the accident, as was plainly the case; and the question thereupon becomes one for the court. The contract, being made in New York, is to be decided by the law of that state; and the substance of the undertaking of the Golden Company was as follows. It promised to keep the "bunk cars" in a "clean, neat, sightly and sanitary condition," and "to be fully and wholly responsible for any injury or damage to persons * * * including * * * employees, which * * * injury or damage * * * be in any way connected with the services to be performed * * * and to indemnify and save harmless the Railroad Company from * * * all * * * judgments * * * which may arise or result directly or indirectly from * * * or by reason of the failure of the contractor fully to keep, perform and fulfill each and every agreement and condition in this contract." Literally this language covers the situation at bar for it was "by reason

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* Restatement of Torts §281(b) Comment c.

** §53, Title 45, U. S. Code.

of the failure" of the Golden Company to perform that the railroad company suffers the judgment; moreover such contracts presuppose that the indemnitee has been made liable and is therefore in some sense at fault. However, its fault may be one which involves no individual neglect of duty; but one which the law imputes to the indemnitee, as an agent's fault is imputed to his principal. It is possible to limit the promises to liabilities of that kind, or to those in which the indemnitee has been guilty of only "passive negligence," if that means something more. The Supreme Court has just left open the interpretation of a similar contract in *American Stevedores* v. *Porello.** Some of the earlier cases in the New York Court of Appeals showed a disposition to construe such language as covering cases where the indemnitee was guilty of individual breach of duty;** but for over ten years and in a series of decisions that court has now laid down what appears to us to be an unswerving canon that if the indemnitee means to throw the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any peradventure of a doubt.† In some of the cases the distinction is made between the indemnitee's "passive" and "active" fault, and, as we have already intimated, we are

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* 329 U. S.

** *Long Island R. R. Co.* v. *American Bridge Co.*, 175 App. Div. 170; aff'd 225 N. Y. 692; *Dudar* v. *Milef Realty Corp.*, 258 N. Y. 415; *Turner Construction Co.* v. *Rockwood Sprinkler Company*, 249 App. Div. 508, aff'd 275 N. Y. 635.

† *Petkinic* v. *Marc Eidlitz & Son Inc.* (1934), 266 N. Y. 437; *Thompson-Starrett Co.* v. *Otis Elevator Co.* (1936), 271 N. Y. 36; *Thompson-Starrett Co.* v. *American Mutual Liability Insurance* (1937), 276 N. Y. 366; *Employers' Liability Assurance Corp., Ltd.* v. *Post and McCord Inc.* (1941), 286 N. Y. 254; *Walters* v. *Rao Electrical Equipment Co.* (1942), 289 N. Y. 57; *Schwartz* v. *Merola Bros. Construction Co.* (1943), 290 N. Y. 145; *Semanchuck* v. *Fifth Ave. & 37th St. Corp.* (1943), 290 N. Y. 412.

not sure whether this means more than imputed fault; but it makes no difference here, for the railroad's fault was "active" on any theory. The doctrine at times has been traced back to *Manhattan Railway* v. *Cornell.** but that was a case in which only the indemnitee appears to have been at fault at all, and where it would have been extremely verbal construction indeed, which should have made liable the indemnitor. In the case at bar more can be said for holding the Golden Company; and as a new question it is perhaps possible to come to the opposite conclusion. Be that as it may, New York decisions are authoritative for us.

Judgment against the railroad affirmed; judgment of the railroad against the Golden Company reversed; and cross-complaint dismissed.

SWAN, *Circuit Judge,* dissenting in part:

An interstate carrier's liability under the Federal Employers' Liability Act is to "any person suffering injury while he is employed by such carrier in such commerce." 45 USCA §51. The first question is whether Mostyn was so employed while asleep on railroad property during the night preceding a Saturday when he may have intended to go to work. Before the amendment of 1939, the authorities clearly indicate to my mind a negative answer. The amendment was intended to do away with the "moment of injury" rule so that an employee whose work has to do with both interstate and intrastate commerce shall not be deprived of the benefits of the Act because his work at the moment of injury was intrastate. It provides that an em-

* 54 Hun 292, aff'd 130 N. Y. 637.

ployee "any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce * * * shall * * * be considered as entitled to the benefits of this chapter." During the night hours normally devoted to sleep the employee owes no duties to his employer; nor do the hours spent in sleep "directly or closely and substantially affect such commerce," even though he may work better after a night's rest. Hence I do not think the 1939 amendment should affect our decision. Mostyn was privileged to sleep in the bunk car (and a certain sum was deducted from his wages if he did so) but he was not required to sleep there; he could, if he wished, have rented a room in the nearby village as one of the track crew did. Therefore the question whether he was employed in interstate commerce during the night is no different than it would be had he been sleeping at a boarding house in the village or at his own home and suffered injury through the negligence of the railroad, as, for example, by reason of the destruction of the house by fire caused by a defective spark arrester in a railroad engine. In my opinion he was not injured while he was employed in interstate commerce. He was, however, an invitee on the railroad premises at night. I think the judgment should be reversed and the cause remanded for a new trial in order that the jury may pass upon his rights as such invitee. I concur in dismissal of the cross complaint.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1329.

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
(Respondent-Impleaded-Appellee),

against

GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased,
Respondent,
(Libellant-Appellee)

and

H. E. MOSS & COMPANY, owner of *S.S. Lucellum*,
Respondent,
(Respondent-Appellant).

BRIEF OF RESPONDENT, H. E. MOSS & COMPANY, IN OPPOSITION TO THE PETITION.

THE FACTS.

The facts are set forth clearly in the opinion of Judge Learned Hand, who wrote the majority opinion below. R. 269-275. The facts, as set forth by petitioner, are not in accord with the facts as set forth by Judge Learned Hand. Cf. R. 272 and petitioner's brief, p. 5.

Argument.

The petitioner bases its petition for certiorari on two grounds. Each ground is insufficient.

The first ground is that the decision below is in conflict with the decisions of the highest court of the State of New York, and that, under the rule laid down by this court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the decision of the court below should have followed the decisions of the highest court of the State of New York.

This contention is erroneous because the rule laid down in *Erie Railroad Co.* v. *Tompkins* applies only to cases in which the jurisdiction of a Federal court depends on diversity of citizenship. In respect of admiralty cases, it does not apply.

> *Guaranty Trust Co.* v. *York,* 326 U. S. 99;
> *Holmberg* v. *Armbrecht,* 327 U. S. 392;
> *Ricketts* v. *Pennsylvania R. Co.,* 153 F. (2d) 757.

The second ground is that the Circuit Court of Appeals misconstrued the contract of indemnity involved herein.

Essentially, the position of petitioner is that a contract of indemnity may not be construed to indemnify the indemnitee against the result of his own negligence "unless such an intention clearly appears". As a general statement, the foregoing may not be questioned. However, it is for courts to determine when "such intention clearly appears". In the present case the Circuit Court held, in substance, that such an intention clearly appeared from the contract involved herein. R. 274, 275. Its decision was in harmony with the following decisions:

> *National Transit Co.* v. *Davis,* 6 F. (2d) 729;
> *Kokusai Kisen, etc.* v. *Columbia Stevedoring Co., Inc.,* 23 F. Supp. 403, 100 F. (2d) 1016;

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Ortolano v. *U-Dryvit Auto Rental Co., Inc.*, 296 Mass. 439;
Clarke v. *Ames*, 267 Mass. 44;
Standard Accident Insurance Co. v. *National Fire Proofing Co.*, 39 Ohio App. 1;
City of Polytechnic v. *Redmon*, 217 S. W. 730 (Texas).

See also:

Santa Fe Ry. v. *Grant*, 228 U. S. 177, 191-193;
Ringling Bros.-Barnum & Bailey Combined Shows, Inc., vs. *Olvera*, 119 F. 2d 584.

Apparently, the New York courts, in construing such agreements, take the somewhat artificial position that the parties do not intend to indemnify against the consequences of an indemnitee's negligence, unless the intention so to do is "unequivocally expressed"—i.e., *in haec verba*.

Thompson-Starrett Co. v. *Otis Elevator Co.*, 271 N. Y. 36;
Employers' L. A. Corp. v. *Post & McCord, Inc.*, 286 N. Y. 254;
Walters v. *Rao Electrical Equipment Co.*, 289 N. Y. 57;
Schwartz v. *Merola Bros. Construction Corp.*, 290 N. Y. 145;
Semanchuck v. *Fifth Ave. & 37th St. Corp.*, 290 N. Y. 412.

The New York decisions represent an extreme which is not in accord with the general weight of authority, as represented by the cases already cited herein.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

Raymond Parmer,
Vernon Sims Jones,
Counsel for H. E. Moss & Company,
Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1946

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BRIEF OF GRACE PULEO, AS ADMINISTRATRIX OF THE ESTATE OF PETER PULEO, DECEASED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACOB RASSNER,
Counsel for Grace Puleo, as Administratrix of the Estate of Peter Puleo, Deceased, Respondent.

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BRIEF OF GRACE PULEO, AS ADMINISTRATRIX OF THE ESTATE OF PETER PULEO, DECEASED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Facts

The facts as set forth in the majority opinion below, R. 269-275, *Cf.* R. 272, by Judge Learned Hand, and the facts set forth by petitioner in its brief, page 5, are somewhat different.

Argument

The petitioner has failed to comply with Revised Rules 12, paragraphs 1 and 38, paragraph 2 of the Supreme Court of the United States and has failed to show its contention upon which authority it bases this Court's jurisdiction to review the decision below.

There is no question involved in this matter which would warrant a review by the Supreme Court of the United States.

The substance of petitioner's contention is that contracts of indemnity have been interpreted differently by the Federal Courts than by the State Courts.

This is the very question which was urged as the basis of the petition for a writ of certiorari in the matter of *American Stevedores, Inc.*, Petitioner, v. *Rosario Porello & United States of America*, Respondents, October Term, 1946, No. 996, in which the petition was granted. 328 U. S. 827, 66 S. Ct. 1013.

This Court reviewed the question in the *Porello* case, 67 S. Ct. 847, and determined that a contract of indemnity between a shipowner and a ship repair yard is one which raises questions of fact and should be determined by the Courts of original jurisdiction on the intent of the parties.

Such contract is not limited or restricted by law so as to give any special benefits to one against the other. It is solely the intent of the parties that govern.

See:

American Stevedores, Inc. v. *Porello, et ano., supra.*

There is no question in the case other than factual controversies, which have already been fully determined.

A disputed question of fact decided by an Admiralty Court is not a subject for review by the United States Supreme Court.

The law is well settled as stated in the case of *Campana Corp.* v. *Harrison*, 114 Fed. (2) 400, on page 405:

> "The reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility."

McDonald v. *Pless*, 238 U. S. 264;
Hyde v. *U. S.*, 225 U. S. 347;
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8 Wigmore, Evidence (3rd Ed. 1940) 668-677, 282 ff.;
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See also:

Letter from Chief Justice Hughes to Senator Wheeler, Senate Report No. 711, 75th Cong., 1st Sess. 38, 39 (June 14, 1937), wherein the late Chief Justice Hughes stated:

> "Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar and get in the way of those that have merit."

The late Chief Justice Hughes further stated in substance, that where the parties have been fully heard in the Courts below, they have no right to burden the Supreme Court with disputes which interest no one but themselves.

This Court has disposed of all legal effect to be given to a contract of indemnity such as is involved in the case at bar (*American Stevedores, Inc.* v. *Porello, supra*), and

nothing remains but an issue of fact already determined by a full review of the evidence in the District Court and then again by the Circuit Court of Appeals for the Second Circuit, which had the authority to review the facts *de novo*.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JACOB RASSNER,
Counsel for Grace Puleo, as Administratrix of the Estate of Peter Puleo, Deceased, Respondent.